AM Assurance Bhd v AXA Affin Assurance Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3(1)–25–54 OF 2006
MOHAMAD ARIFF JC
29 SEPTEMBER 2009

Arbitration — Award — Setting aside — Jurisdiction of High Court — Whether High Court may set aside decision of arbitral tribunal — Whether arbitrator wrongly refused to admit expert evidence — Whether arbitrator wrongly concluded that applicant failed to act prudently, diligently and in business-like manner — Whether technical misconduct established — Whether award suffered from any irregularity of action or perversity in application of relevant law — Jurisdiction of High Court to correct arbitral error only — High Court not to exercise appellate jurisdiction — Arbitration Act 1952 s 24(2)

The applicant had provided insurance cover to Palmex Industries Sdn Bhd ('Palmco') under two sets of insurance policies. The respondent had provided reinsurance cover in relation to the said policies. The dispute arose from a demand by Palmco for payment after an explosion occurred at its plant. The applicant as the insured, and the reinsured, sought an indemnity from the respondent as reinsurers. Disagreement arose on the proper characterisation of the casualty and the respondent refused to pay. Palmco then commenced civil proceedings against the applicant where the court ordered that Palmco be paid under the policies. The respondent however continued to deny liability. The dispute between the applicant and the respondent was then referred to arbitration. The learned arbitrator dismissed the applicant's claim. The arbitrator concluded the claimant was not entitled to be indemnified by the respondent for its share of liability under the reinsurance agreements. The arbitrator further concluded that the claimant, as cedent under the reinsurance contract, had not acted diligently, prudently or in a businesslike manner, or in accordance with its obligations under the reinsurance agreements, in dealing with the claims brought by Palmco in court. The applicant did not accept the arbitrator's decision and applied to set aside the award under s 24(2) of the Arbitration Act 1952 ('the Act'), alleging the following 'misconduct' on the part of the arbitrator: (i) failure to perform essential duties cast on the arbitrator; and (ii) some irregularity of action not consonant with general principles of equity and good conscience. In addressing the issue of misconduct, the applicant advanced the following grounds: (a) the arbitrator wrongly refused to admit expert evidence on the meanings and effects of the 'follow the settlement' and 'claims control' rules in reinsurance contracts; and

(b) The arbitrator wrongly concluded the applicant had failed to act prudently, diligently and in a business-like manner.

Held, dismissing the application with costs:

(1) It is not misconduct to make erroneous findings of law or fact. Among the instances of technical misconduct is included a failure to decide all matter referred to him, and where there has been some irregularity in the proceedings or generally some mishandling of the arbitration proceedings that there has likely occurred some substantial miscarriage of justice. These enumerated instances of misconduct allowing the courts to interfere with an award, and where necessary to set aside or remit, have to be seen in context. In this context, the case law supports a limited jurisdiction to intervene. Lack of appraisal of the law and the evidence is not per se a good ground to set aside or remit for reconsideration by the arbitral tribunal. There has to be a 'serious failure' to analyse and appraise 'material' and 'relevant' evidence; *Sami Mousawi Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 CLJ 186 (referred); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 (referred) (see paras 14–16).

(2) There was no technical misconduct on the arbitrator in excluding the expert evidence. The act of the arbitrator not to admit expert evidence was a considered one as evidenced by his tightly-reasoned decision on the matter. There was no possible evidence to support an inference of 'irregularity of action' or any non-application of correct principles of law. On the contrary, the learned arbitrator carefully considered the relevant leading cases in holding that they established the proposition that the reassured as original insurer must prove that it was legally liable to the insured under the original insurance policy before it can ask the reinsurer to indemnify it under the policy of reinsurance (see paras 24–25).

(3) Seen as a whole, the award did not suffer from any irregularity of action or any perversity in the application of the relevant law in the area of reinsurance. Further, in relation to the Penang High Court judgment, the learned arbitrator came to certain findings of fact on the evidence, and it was not the proper jurisdiction of the court, in exercise of its jurisdiction under s 24(2) of the Act, to interfere with these findings. The jurisdiction of the High Court is to correct an arbitral error, not to exercise an appellate jurisdiction whereby the decision of the learned arbitrator can be made subject to a rehearing. That would be wrong (see para 28).

[Bahasa Malaysia summary

Pemohon telah memberikan perlindungan insurans kepada Palmex Industries Sdn Bhd ('Palmco') di bawah dua set polisi insurans. Responden telah menyediakan perlindungan semula insurans berhubung dengan polisi-polisi

tersebut. Pertikaian timbul dengan permintaan oleh Palmco bagi pembayaran selepas berlakunya satu letupan di kilang. Pemohon sebagai pihak yang diinsuranskan, dan pihak yang diinsuranskan semula, memohon ganti rugi daripada responden sebagai penginsurans semula. Percanggahan pendapat timbul berkenaan pencirian mangsa dan responden enggan membayar. Palmco kemudiannya memulakan prosiding sivil terhadap pemohon di mana mahkamah mengarahkan bahawa Palmco akan dibayar di bawah polisi. Walau bagaimanapun, responden terus menafikan liabiliti. Pertikaian antara pemohon dan responden dirujuk kepada timbang tara. Penimbang tara yang terpelajar menolak tuntutan pemohon. Penimbang tara menyimpulkan bahawa pihak yang menuntut tidak berhak untuk ditanggung rugi oleh responden ke atas bahagian liabilitinya di bawah perjanjian semula insurans. Penimbang tara selanjutnya menyimpulkan bahawa pihak yang menuntut, sebagai 'cedent' di bawah kontrak insurans semula, telah tidak bertindak dengan tekun, berhemat atau dengan cara perniagaan, atau selaras dengan obligasinya di bawah perjanjian insurans semula, dalam berurusan dengan tuntutan yang dibawa oleh Palmco di mahkamah. Pemohon tidak menerima keputusan penimbang tara dan memohon untuk menetapkan pengetepian award di bawah s 24(2) Akta Timbang Tara 1952 ('Akta'), dengan mendakwa 'salah laku' di pihak penimbang tara: (i) kegagalan untuk melaksanakan tugas penting yang diamanahkan kepada penimbang tara tersebut; dan (ii) beberapa salah aturan tindakan yang tidak selari dengan prinsip-prinsip am ekuiti dan suci hati. Dalam menangani isu salah laku, pemohon mengemukakan berikut: (a) penimbang tara terkhilaf kerana enggan menerima keterangan pakar dalam makna dan kesan 'follow the settlement' dan 'claims control' dalam kontrak insurans semula; dan (b) penimbang tara terkhilaf dalam menyimpulkan bahawa pemohon telah gagal untuk bertindak secara berhemah, tekun dan dengan cara perniagaan.

Diputuskan, menolak permohonan dengan kos:

(1) Penemuan undang-undang atau fakta yang salah bukanlah salah laku. Antara contoh-contoh salah laku teknikal termasuk kegagalan untuk memutuskan semua perkara yang dirujuk kepadanya, di mana terdapat beberapa salah aturan dalam prosiding atau secara amnya beberapa pengendalian yang tidak betul mengenai prosiding timbang tara bahawa ada kemungkinan berlaku beberapa ketidakadilan. Keadaan salah laku ini disebut satu persatu dan membenarkan mahkamah untuk campur tangan ke atas award, dan di mana perlu untuk mengetepikan atau meremitkan, perlulah melihat kepada konteks. Dalam konteks ini, kes-kes undang-undang menyokong bidang kuasa yang terhad untuk campur tangan. Kekurangan penilaian undang-undang dan keterangan tidak, semata-mata, menjadi alasan yang baik untuk mengetepikan atau meremitkan pertimbangan semula oleh tribunal timbang tara. Perlu ada kegagalan serius untuk menganalisa dan menilai bahan dan kerelevanan

bukti; *Sami Mousawi Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 CLJ 186 dirujuk; *Sharikat Pemborong Pertanian & Perumahan v Persekutuan Lembaga Kemajuan Tanah* [1971] 2 MLJ 210 dirujuk (lihat perenggan 14–16).

(2) Tiada salah laku teknikal di pihak penimbang tara dalam tidak memasukkan keterangan pakar. Perbuatan penimbang tara tidak menerima keterangan pakar adalah satu yang dipertimbangkan seperti yang dibuktikan oleh keputusan yang ketat dan berasas mengenai perkara itu. Tiada bukti yang berkemungkinan untuk menyokong inferens salah aturan tindakan atau apa-apa ketidakterpakaian prinsip undang-undang yang betul. Sebaliknya, penimbang tara yang terpelajar dengan berhati-hati mempertimbangkan kes-kes terkemuka dalam memutuskan bahawa mereka mencadangan bahawa pihak yang dijamin semula sebagai penanggung insurans asal mestilah membuktikan bahawa ia adalah sah bertanggungjawab ke atas pihak yang diinsuranskan di bawah polisi insurans asal sebelum ia boleh meminta penanggung insurans semula untuk menanggung rugi di bawah polisi insurans semula (lihat perenggan 24–25).

(3) Dilihat secara keseluruhan, award tersebut tidak mengalami apa–apa salah aturan tindakan atau sebarang kecenderungan dalam aplikasi undang-undang yang berkaitan dalam bidang insurans semula. Selanjutnya, berhubung dengan penghakiman Mahkamah Tinggi Pulau Pinang, penimbang tara yang terpelajar membuat beberapa penemuan fakta tertentu ke atas bukti, dan ia bukan bidang kuasa mahkamah betul, dalam menjalankan bidang kuasanya di bawah s 24(2) Akta, untuk campur tangan dengan penemuan ini. Bidang kuasa Mahkamah Tinggi adalah untuk memperbetulkan kesilapan timbang tara, bukan untuk menjalankan bidang kuasa rayuan di mana keputusan penimbang tara terpelajar boleh dibuat tertakluk kepada pendengaran semula. Itu akan menjadi salah (lihat perenggan 28).]

Notes

For cases on setting aside, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1628–1692.

Cases referred to

Commercial Union Assurance Company plc v NRG Victory Reinsurance Ltd [1998] 2 All ER 434, CA (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)

Insurance Co of Africa The v Scor (UK) Reinsurance Co Ltd [1985] 1 Lloyd's Rep 312, CA (refd)

John Robert Charman v Guardian Royal Exchange Assurance plc & Anor [1992] 2 Lloyd's Rep 607 (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)

Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak [2004] 2 MLJ 414; [2004] 2 CLJ 186, CA (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor [1997] 5 MLJ 601, HC (refd)

Legislation referred to

Arbitration Act 1952 s 24(2)

Liew Teck Huat (TH Liew & Partners) for the applicant.
Tunku Farik Ismail (WL Wong with him) (Azim, Tunku Farik & Wong) for the respondent.

Mohamad Ariff JC:

PROCEDURAL BACKGROUND

[1] In this application to set aside an arbitral award of a single arbitrator dated 22 March 2005, under s 24(2) of the Arbitration Act 1952, the ground raised by the applicant was 'misconduct' of the arbitrator. The applicant claimed against the respondent in respect of a reinsurance cover from the respondent.

SUMMARY FACTS

[2] The applicant had provided insurance cover to Palmex Industries Sdn Bhd (Palmco) under two sets of insurance policies, respectively described as MB/LOP policy and Fire/LOP policy. The first covered machinery breakdown and loss of profits following the machinery breakdown. The second covered a fire policy and consequential loss.

[3] The cover under the MB/LOP policy was for a larger sum than the Fire/LOP policy.

[4] The applicant as insurer sought reinsurance cover, for which three reinsurance companies granted the cover, namely Scor, Aegon and Axa Affin, the respondent.

[5] The arbitration concerned only the respondent; the applicant was the claimant in that arbitration.

[6] The dispute arose from a demand by the insured, Palmco, for payment after an explosion occurred at its EMI–3 plant in Prai, which was followed by a fire. Palmco claimed under the MB/LOP policy. The applicant as the insurer, and the reinsured, sought an indemnity from the reinsurers. The reinsurers took the position that the casualty fell within the Fire/LOP policy, not the MB/LOP policy. There was therefore disagreement on the proper characterisation of the casualty, and the applicant then appointed a firm of solicitors to advise them on how best to proceed.

[7] The insured exerted pressure on the applicant for payment, and threatened to complain to Bank Negara. The applicant then decided to pay RM1,845,736 to Palmco under the Fire/LOP policy, as it felt this was the prudent position to take since the reinsurers had indicated payment should be made under this policy. Palmco however refused to accept this payment as full and final payment, but received it as only part-payment under the MB/LOP policy, and sued for the balance allegedly due to it.

THE CONSOLIDATED ACTION IN THE PENANG HIGH COURT

[8] Two civil proceedings were commenced by Palmco against the present applicant, consolidated and proceeded to trial. The same firm of solicitors advised it on the approach that it took at the trial. The trial proceeded on the basis of certain agreed issues, which excluded the issue of whether the casualty was related to a chemical explosion. That would have been an express exclusion under the MD/LOP policy.

[9] The applicant lost the trial and the High Court in Penang ordered that Palmco be paid RM1,950,349.70 together with interest and costs, over and above the sum of RM1,875,736 already paid to the company.

DENIAL OF LIABILITY BY AXA AFFIN AND ARBITRATION

[10] The other two reinsurers paid their respective shares, but not the respondent, who, when the indemnity was sought from them, replied through their solicitors denying liability.

[11] The dispute between the applicant and the respondent was then referred to arbitration before the sole arbitrator, Dato' Sri George KS Seah. The learned arbitrator dismissed the applicant's claim. The arbitrator concluded the claimant was not entitled to be indemnified by the respondent for its share of liability under the reinsurance agreements, namely the MB and MB/LOP policies. Further, the claimant, as cedent under the reinsurance contract, had not acted diligently, prudently or in a businesslike manner, or in accordance with its obligations under the reinsurance agreements, in dealing with the

claims brought in the consolidated action in the Penang High Court Civil Suits No 22–133 of 1996 and No 22–134 of 1996.

SETTING ASIDE PROCEEDINGS AND LAW ON MISCONDUCT

[12] The applicant did not accept the arbitrator's decision, and applied to set aside the award, as earlier noted, under s 24(2) of the Arbitration Act 1952, alleging 'misconduct' on the part of the arbitrator. The applicant, in advancing its case on misconduct, relied on principles stated in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, as subsequently referred to and applied in numerous Malaysian decisions such as *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 and *Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor* [1997] 5 MLJ 601.

[13] *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, describes misconduct in the following terms:

> In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment, the plaintiff's complaint is sustainable only if the failure to do so had occasioned a miscarriage of justice that is apparent on the face of the award … (at p 211 of the report).

[14] The applicant accepted and stressed the 'misconduct' it was relying on did not in any way suggest moral turpitude, but 'technical misconduct' in the sense explained in the cases. Two main aspects appear from the above passage: (1) failure to perform essential duties cast on the arbitrator; and (2) some irregularity of action not consonant with general principles of equity and good conscience. Nevertheless, it is not misconduct to make erroneous findings of law or fact. *Halsbury's Laws of England* ((4th Ed), 1991, Vol 2) contains a useful summary of what constitutes misconduct:

> Misconduct has been described as 'such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice'. Most cases depend as much upon the terms of the reference and on the surrounding circumstances as upon the conduct of the arbitrator or umpire, and it is therefore difficult to provide an exhaustive definition of the term.

When an Arbitrator fails to comply with the terms, express or implied, of the Arbitration Agreement, that will amount to misconduct. But, whether or not he complies with those terms, he will misconduct himself if he acts in a way that is contrary to public policy. In particular, it would be misconduct to act in a way which is, appears to be, unfair. Misconduct committed in good faith is sometimes referred to as 'technical misconduct', the all allegations of misconduct asserts the breach of duty. It is not misconduct to make an erroneous findings of law or fact.

Misconduct has been found to have occurred in the following instances, some of which would also give the court jurisdiction to intervene or some other grounds: (1) where the arbitrator or umpire fails to decide all matters which were referred to him; (2) whereby his award the Arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference; (3) where the award is uncertain; (4) whether has been irregularity in the proceedings; but with the complaining party continues with the reference after knowing of the irregularity, he may impliedly agree to that manner of proceeding, or may waive his right to object; (5) where the arbitrator or umpire has acted unfairly and in breach of the rules of natural justice; (6) where the Arbitrator or umpire delegates any part of its authority, whether to a stranger or to one of the parties, or even to a co-arbitrator; (7) where the Arbitrator or umpire accepts the hospitality of one of the parties, being hospitality offered with the intention of influencing his decision or actually influencing it; (8) where the Arbitrator or umpire appears to be biased has an interest in the subject matter of the reference; (9) where the Arbitrator or umpire takes a bribe from either party (at para 694 of *Halsbury's*).

[15] Among the instances of technical misconduct is included a failure to decide all matter referred to him, and where there has been some irregularity in the proceedings or generally some mishandling of the arbitration proceedings that there has likely occurred some substantial miscarriage of justice.

[16] These enumerated instances of misconduct allowing the courts to interfere with an award, and where necessary to set aside or remit, have to be seen in context. In this context, the case law supports a limited jurisdiction to intervene. Lack of appraisal of the law and the evidence is not per se a good ground to set aside or remit for reconsideration by the arbitral tribunal. There has to be a 'serious failure' to analyse and appraise 'material' and 'relevant' evidence: *Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414; [2004] 2 CLJ 186 (Court of Appeal). *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210: '… failure to analyse, and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.' (at p 211)

[17] *Sharikat Pemborong Pertanian & Perumahan* also states the general principles to be applied as follows:

> … this is not a re-hearing. … I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood…' (per Raja Azlan Shah (as His Majesty then was) at p 211).

GROUNDS ADVANCED BY THE APPLICANT

[18] In addressing the issue of misconduct, the applicant advanced the following grounds:

(a) the arbitrator wrongly refused to admit expert evidence on the meanings and effects of the 'follow the settlement' and 'claims control' rules in reinsurance contracts; and

(b) the arbitrator wrongly concluded the applicant had failed to act prudently, diligently and in a business-like manner.

[19] As concluded by the applicant's counsel in his written submission:

> … the Arbitrator misconducted himself. He disregarded admissible evidence. He construed the reinsurance contract in a vacuum without considering the underlying factual matrix. He disregarded business efficiency and established insurance and reinsurance practice.

EXCLUSION OF EXPERT EVIDENCE

[20] The applicant had sought to introduce the expert evidence of the former Chief Executive Officer of Singapore Reinsurance and a council member of the Association of Reinsurers, namely one Jeffrey Yeo. Mr Yeo produced a report in which he had noted the absence of a 'claims cooperation' clause in the particular reinsurance policy. This expert witness concluded that in the absence of the 'claims cooperation clause', the claimant, as primary insurer, retained the right to conduct the claim settlement proceedings with the insured subject to the primary insurer acting in good faith and in a businesslike manner. This meant, according to the expert witness, that an insurer was entitled to conduct proceedings in an action as it thought it, and therefore the reinsurer would be obliged to 'follow the settlement' and provide an indemnity under the insurance cover unless insurer could be shown to have acted in bad faith or in an un-businesslike manner. Mr Yeo concluded in his report:

> The Claimant had acted in good faith and in the interest of reinsurers by offering to settle RM1,845,736.00 to the insured under the fire consequential loss policy given the stand adopted by certain reinsurers that the machinery breakdown policies were

not liable. Such an act served to demonstrate good faith on the part of the Claimant, and would also help to reduce interest payment.

When the insured instituted action, the Claimant duly engaged lawyers to handle the matter in the litigation and to advise them, which further demonstrates proper and responsible claim ending on the part of the Claimant.

… I can only conclude that the Claimant has every right to seek recovery of the insured's claim under the machinery breakdown policies from the Respondent.

[21] The applicant regarded this evidence was significant, relevant and critical. Since this expert evidence was disallowed by the arbitrator, it was argued that this amounted to 'misconduct'. According to this argument, the arbitrator had misconducted himself in excluding evidence in the nature of evidence on the established market practice on what was meant by 'follow the settlement' and 'claims control' in reinsurance contracts.

[22] In this regard, the learned arbitrator had the expert witness report by Mr Jeffrey Yeo before him, and in a separate ruling (see exh 'AS5' to the supporting affidavit of Amarjeet Singh a/l Gurdial Singh) decided, bearing in mind the amended points of defence, the question of reinsurance practice/custom in Malaysia had not been pleaded and therefore did not arise for determination. That was the reason why the learned arbitrator chose to disregard the expert report by Mr Jeffrey Yeo.

FAILURE TO ACT PREDUDENTLY, DILIGENTLY AND IN A BUSINESS-LIKE MANNER IN THE CONTEXT OF 'CLAIMS CO-OPERATION' AND 'FOLLOW THE SETTLEMENT' PRINCIPLES

[23] As for the second main ground, ie the arbitrator's conclusion that the applicant had failed to act prudently, diligently and in a businesslike manner, this had to do with the arbitrator's ruling that the applicant's failure to argue 'the chemical exclusion clause' before the High Court in Penang showed lack of prudence and diligence. Since the applicant had appointed competent solicitors to advise it, the arbitrator's conclusion was contrary to industry practice, and further the applicant could not be made personally accountable for the act of its solicitors.

EVALUATION

[24] Having perused the entirety of the award by the learned arbitrator and considered the submissions of counsel and the relevant authorities on the jurisdiction of this court to correct arbitral errors, in particular in relation to principles of law applicable in the area of reinsurance, I was not persuaded that there was any technical misconduct on the arbitrator in excluding the expert

evidence of Mr Jeffrey Yeo, the former chief executive officer of Singapore Reinsurance. The act of the arbitrator not to admit expert evidence was a considered one as evidenced by his tightly-reasoned decision on the matter. There was no possible evidence to support an inference of 'irregularity of action' or any non-application of correct principles of law. On the contrary, the learned arbitrator carefully considered the relevant leading cases of *The Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312 (which was a case relied on by the claimant's counsel too), *Commercial Union Assurance Company plc v NRG Victory Reinsurance Ltd* [1998] 2 All ER 434 and *John Robert Charman v Guardian Royal Exchange Assurance plc & Anor* [1992] 2 Lloyd's Rep 607.

[25] These cases were analysed in detail by the learned arbitrator who held that they established the proposition that the reassured as original insurer must prove that it was legally liable to the insured under the original insurance policy before it can ask the reinsurer to indemnify it under the policy of reinsurance. With particular reference to the *SCOR*'s case, the learned arbitrator came to the view that it established the proposition that even where there existed a 'follow the settlements clause' and a judgment of a court of competent jurisdiction (on the facts, a foreign court), the reassured had still to prove that it was legally liable to the insured under the terms and conditions of the original policy. Further, the reinsurer was entitled to raise all the defences pleaded. See paras 27.2–27.2.1 of the final award.

[26] As regards the finding that the applicant had failed to act diligently, prudently and in a businesslike manner, the following passages in the award are pertinent:

> 21.6 In my opinion, a prudent insurer would not have allowed the assured to act in this manner. A fortiori, a prudent insurer would never have allowed the said cheque intended for settlement of the fire — con policy to be used by it as part payment of MBA/LOP policy. In my opinion, a prudent insurer would have demanded for the said cheque to be returned if the assured did not agree to accept the terms and conditions of the offer. Here, it seems to me that the claimant, as insurer had allowed the assured to dictate how and in what manner the claim was to be settled. This was a preposterous state of affairs and based on the aforesaid findings, I am satisfied that the Claimant had not acted as a prudent insurer or had not acted in a businesslike manner in dealing with the claim of Palmex Industries Sdn Bhd on the evidence produced before me in this reference.

[27] The learned arbitrator also noted the only issue submitted before the Penang High Court was couched in terms of whether the proximate cause of the explosion at the EMI-3 plant was caused by fire or some other cause. The agreed issue did not include the exception clause under the policy, in particular the chemical explosion exception. When counsel for the defendant (the present

applicant) attempted to raise this chemical explosion exception, this was disallowed by the learned High Court judge who held the parties were bound by the agreed issues. On this the learned arbitrator held:

> 38.2 I am also satisfied that the claimant had not acted in a businesslike manner in its conduct of the defence and/or proceedings in respect of the consolidated action in the Penang High Court.
>
> 38.3 In my opinion, having regard to the stand taken by the Respondent that the FCL policy, and not the MD/LOP policy, should apply, the prudent step to take by the claimant in the consolidated action and the pending High Court would be to put all the issues to be determined and the judge after a full blown hearing when all the witnesses were called and subjected to cross examination by opposing counsel, A fortiori, the trial should also include the determination of exclusion 3 and the defence of chemical explosion.
>
> 38.4 In my opinion, that would be the prudent and businesslike proceeded to be adopted, in the context of the facts of this case.

CONCLUSION

[28] Seen as a whole, therefore, the award did not suffer from any irregularity of action or any perversity in the application of the relevant law in the area of reinsurance. Further, in relation to the Penang High Court judgment, the learned arbitrator came to certain findings of fact on the evidence, and it is not the proper jurisdiction of this court, in exercise of its jurisdiction under s 24(2) of the Arbitration Act 1952, to interfere with these findings. The jurisdiction of the High Court is to correct an arbitral error, not to exercise an appellate jurisdiction whereby the decision of the learned arbitrator can be made subject to a rehearing. That would be wrong.

[29] In the circumstances, the application was dismissed with costs to be taxed unless agreed.

Application dismissed with costs.

Reported by Kanesh Sundrum